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SUPREME COURT, U.S.
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No.

IN THE

Supreme Court Of The United States

October Term, 1989

JOANNE C. NEWAK,

Petitioner,

vs.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether an appellate court which found prejudicial error, based upon conflict of interest in a single criminal matter where a defense attorney represented both Petitioner and a government witness against Petitioner, could hold such error fatal to some charges but harmless to others.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOANNE C. NEWAK, Petitioner,

vs.

UNITED STATES, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The Petitioner, Joanne C. Newak, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in the case entitled, United States v. Newak on September 8, 1989.

OPINIONS IN COURTS BELOW

The following opinions have been issued in the Courts below, and are reprinted in the Appendix:

1. United States v. Newak, ACM 23544, decision of General Court-Martial, Military Judge Robert H. Leonard, 11 March 1982, set forth in the Report of Result of Trial, dated 11 March 1982. Unpublished. Reprinted in the Appendix at pages 70 to 72.

2. United States v. Newak, Staff Judge Advocate's Review of Trial by Court Martial, 6 May 1982. Unpublished. Reprinted in the Appendix at pages 75 to 103.

3. United States v. Newak, United States Air Force Court of Military Review, 14 December 1982. Published at 15 M.J. 541 (AFCMR 1982). Reprinted in the Appendix at pages 109 to 115.

4. United States v Newak, United States Air Force, Action of the Judge Advocate General, dated 23 March 1983 (ACM 23544). Unpublished. Reprinted in the Appendix at page 116.

5. United States v. Newak, United States Court of Military Appeals, 13 July 1987. Published at 24 M.J. 238 (CMA 1987). Reprinted in the Appendix at pages 117 to 132.

6. United States v. Newak, United States Air Force Court of Military Review, 16 October 1987. Unpublished. Reprinted in the Appendix at pages 135 to 141.

7. United States v. Newak, United States Air Force Court of Military Review, 6 January 1989. Unpublished. Reprinted in the Appendix at pages 149 to 155.

8. United States v. Newak, United States Court of Military Appeals, 8 September 1989. Unpublished. Reprinted in the Appendix at pages 156 to 157.

JURISDICTION

Jurisdiction in the United States Supreme Court is invoked upon 28 USC Section 1259(1), seeking review of a decision of the Court of Military Appeals dated 08 September 1989, and entered on said date, affirming Petitioner's conviction after court-martial under jurisdiction of 10 USC Section 817 on March 10 and 11, 1981.

This petition for certiorari is filed within 60 days of the decision of the Court.

TEXT OF CONSTITUTIONAL PROVISIONS

Provisions of the United States Constitution

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution
Fifth Amendment

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution
Sixth Amendment

STATEMENT OF THE CASE

Basis of Federal Jurisdiction

The Petitioner was tried before a United States Air Force Court-Martial under jurisdiction of 10 USC Section 817 on March 10 and 11, 1982. The Report of Result of Trial was issued by the judge who sat at the court-martial on March 11, 1982. See Appendix, pages 70 to 72.

The conviction and sentence was appealed to the United States Air Force Court of Military Review, where the conviction and sentence were affirmed on December 14, 1982. See Appendix, pages 109 to 115.

The Court of Military Appeals reviewed the decision under jurisdiction based on 10 USC Section 867(b)(3), and on 13 July 1982 reversed in part, and remanded the case to the Military Court of Review for further consideration. See Appendix, pages 117 to 132. The Court by order dated 19 August 1982 retained jurisdiction. See Appendix, pages 133 to 134. The Court of Military Review affirmed the remaining convictions on 16 October 1987, and ordered a rehearing on sentencing. See Appendix, pages 135 to 141.

The Court of Military Review again affirmed the remaining convictions after resentence on 06 January 1989. See Appendix, pages 149 to 155.

The Court of Military Appeals affirmed the decision of the Court of Military Review on 08 September 1989. See Appendix, page 156 to 157.

Facts of the case

I

On or about June 17, 1981, Airman First Class Donna L. Ryan, who was then stationed at Hancock Field, New York, was arrested on a driving while intoxicated charge. At some point after her arrest, Ryan began to act as an informant for, and provide information to, the Air Force Office

of Special Investigation. As an informant, she reported that Airman John Liles, Lieutenant Joanne Newak and Senior Airman Lynne Peelman, were using controlled substances in the vicinity of Hancock Airfield where they were stationed with the U.S. Air Force. An agent of the Air Force Office of Special Investigation contacted Newak, Peelman and Liles, and advised them of their rights. All three denied the reported activities.

In early September, 1981, Newak, Peelman and Liles sought legal counsel at Griffiss Air Force Base. Area defense counsel Captain John Powers was assigned to all three. He met with Newak and Peelman and established an attorney-client relationship with both. At about the same time, Powers also undertook representation of Liles. Powers became aware of an impending transfer in late August or early September of 1981. Starting in either September or early October, Powers brought Captain John Smith to interviews with Newak, Peelman and Liles as co-counsel. Smith established an attorney-client relationship with each of them and later represented each as sole counsel.

On or about Tuesday October 20, 1981, Smith entered into negotiations with government counsel. These negotiations resulted in testimonial immunity being offered to two of his three clients, Peelman and Liles. At about this time he told Peelman and Liles that "Newak was going down the tubes", and to stay away from her. He specifically urged Peelman to co-operate with the government.

On or about Friday, October 23, 1981, Smith withdrew from the defense of Newak. Smith continued to represent Peelman throughout the proceeding, including the trial of Newak's court-martial, and Newak was assigned other defense counsel. Liles also was given different defense counsel at about this time.

Charges I to IV of the original charge sheet, set forth in the Appendix at pages 1 to 7, alleged various drug related offenses and behavior unbecoming an officer, all of which were based upon accusation made by Ryan, were preferred against Newak on October 23, 1981.

Major Maurice Deaver was assigned as Investigating Officer on these charges, and he conducted an Article 32 hearing on November 6, 1981. At this hearing, Peelman refused to testify upon advice of Smith, and Liles also refused to testify based upon advice of his defense counsel. In his report of the same date, set forth in the Appendix at pages 7 to 22, Deaver concluded there was not enough evidence to proceed to trial on the charges. He specifically recommended steps be taken to secure additional testimony, and, if such testimony could be obtained, the matter then be reopened.

After the completion of the initial Article 32 hearing, Smith finalized negotiations for Peelman's testimonial immunity, thereby assisting in the prosecution of his former client Newak. In December, based upon the information obtained from Peelman, which had been provided to the government throught Smith's encouragement, additional charges based upon a sexual relationship between Newak and Peelman were added to the charges. These charges are set forth in the additional charge sheet, set forth in the Appendix at pages 23 to 28.

On January 6, 1982, a second Article 32 investigation was conducted by Investigating Officer Colonel Lawrence Gingold. With grants of immunity, Peelman and Liles both testified at this hearing, and the Investigating Officer in his report, set forth in the Appendix at pages 32 to 47, recommended that Newak be tried by court-martial.

Newak entered pleas of Not Guilty to all of the charges and their specifications.

On 10 and 11 March 1982, Petitioner was tried by general court-martial with a military judge sitting alone.[1] At the trial, Peelman was the chief prosecution witness against Newak. She was advised by Smith throughout her testimony. Smith was called as a defense witness at the trial, and he admitted that he had represented Newak on the same charges. Peelman was never charged or prosecuted. Liles did not testify at the trial, but his written testimony from

the second Article 32 hearing, obtained under his grant of immunity, was used at the trial. The trial judge at the court-marital found Newak guilty of all of the charges and the specifications referred to trial.[1]

Lt. Newak was sentenced to dismissal, confinement at hard labor for seven years, and forfeiture of all pay and allowances.

During administrative reviews, several charges were dismissed and several were reduced, and her sentence was eventually reduced to three years.[2]

II

In the second Article 32 hearing, when the government used evidence which was derived from Peelman and Liles, who had been represented by Newak's former defense attorney, Petitioner challenged the use of that testimony as violative of her constitutional rights. The Investigating Officer accepted the offered proof, and did not consider the constitutional challenge, stating "he was making no recommendation on this matter which does not directly relate to the form of the charges and specifications and the truth thereof."

As noted above, during the course of the trial Smith was called as a witness for the defense. He testified concerning the matter of immunity:

Q: Did you bring up the subject of immunity?

A: With whom?

Q: With the Base Staff Judge Advocate?

A: Not directly, no. They brought it up to me.

Q: And was there any bargaining on your part, between acting for Airman Peelman vis-a-vis the Base Staff Judge Advocate at Hancock?

A: I don't quite understand.

Q: In other words, did you say - did you go in and say, "If you'll give us immunity, no prosecution of Airman Peelman, Airman Peelman will roll on Lieutenant Newak," or anything like that?

A: No, not directly. It was back and forth. They were trying to figure out who to work out immunity with. I was dealing with my client Airman Peelman! as to whether or not that is what she wanted me to work out for her.

(Emphasis added.)
United States v Newak, 24 M.J. at 240.

In addition, as was noted by the Court of Military Appeals in its decision, Smith acknowledged during the trial, that while representing Peelman, his advice to her to cooperate under the anticipated grant of testimonial immunity may have been affected by confidences entrusted by Newak, as was revealed by this colloquy with the military judge:

Q: Were you ever told by Captain Powers what Lieutenant Newak's version of what the potential offenses was?

A: Yes, sir.

Q: So, Captain Powers did relate to you what Newak, what Lieutenant Newak had told him about these offenses?

A: Yes, sir.

Q: Did you ever reveal this information that Captain Powers told you about Lieutenant Newak's version of the offenses, to Airman Peelman?

A: Not consciously, sir.

Q: What do you mean by not consciously?

A: I never took that information and directly related to Airman Peelman.

Q: Do you feel that you might have unconsciously done so?

A: I feel that information may have impacted on my conversations with Airman Peelman.

Q: In what way?

A: Well, after I was separated from Lieutenant Newak, the possibility of immunity came up for Airman Peelman, and I knew some things about Lieutenant Newak that may have influenced how I recommended

to Airman Peelman that she should go.

United States v Newak, 24 M.J. at 240.

Petitioner's motion at the trial to dismiss all charges based upon the violation of her constitutional right to effective assistance of counsel was denied by the judge.

In her reply to the Staff Judge Advocate's Review of the trial by court-martial, set forth in the Appendix at pages 75 to 103, Petitioner renewed her motion, which was again denied.

Petitioner raised the issue of ineffective assistance of counsel in her appeal to the Air Force Court of Military Review. The court affirmed the conviction and sentence as approved, on December 14, 1982, in United States v. Newak, 15 M.J. 541.

Petitioner raised the issue again on appeal to the Court of Military Appeals. In its decision of 13 July 1987, 24 M.J. 238, the court found that Smith's actions constituted a conflict of interest, which was prejudicial to Newak. The court observed "In short, because Captain Smith was not free to to argue against Peelman's interest, he was not free to represent Newak adequately."
United States v Newak, 24 M.J. at 243.

The court observed that Smith's conduct with respect to the matter of immunuity amounted to abandonment of Newak. United States v Newak, 24 M.J. at 244.
In effect, although Newak though she was being represented by Smith, she was in reality without assistance of counsel during a crucial stage of the proceedings.

The court determined that as a consequence of the conflict of interest,

> "[t]he testimony of Peelman and any evidence or information derived therefrom was tainted and should not have been admitted in evidence at the trial."

United States v Newak, 24 M.J. at 244.

The court found that the findings of guilty that arose from Peelman's testimony could not stand. The court remanded the case to the Judge Advocates office for the Court of Military Review for determination as to whether independent evidence existed upon which those charges could be reprosecuted. In addition, the court noted that the issue of possible "spillover" of the taint from the affected charges to the remaining charges had not been considered by the Court of Military Review, and remanded the case to the court for review.

The court instructed:

> The record of trial is returned to the Judge Advocate General of the Air Force for remand to that court for consideration of the issue of whether the remaining findings of guilty were tainted by the actions of defense counsel. If they were, a rehearing may be ordered on all charges and specifications which were approved by the convening authority. If they were not tainted, a rehearing may be ordered on the specifications and Charges affected by the decision of this Court and the sentence. If a rehearing on findings is deemed impracticable, the affected Charges and specifications may be dismissed. If any specifications remain, a rehearing on sentence may be ordered.

United States v Newak, 24 M.J. at 244.

While the Court of Miltary Appeals addressed at some length Smith's conduct during the course of the pretrial stages of the proceedings, and his improper use of information he derived from his representation of Newak, the court failed to recognize the impact such conduct had on Newak's prosecution. The court noted Smith's conduct impacted on every phase of the case, including the decision to prosecute Newak in a court-martial. The remedy the court fashioned failed to address the actual nature of the harm inflicted on

Newak as a result of her former's counsels conduct. In finding that the error was harmless with respect to the charges on which Peelman did not testify, the court placed

an improper restriction on the right to effective assistance of counsel.

Upon remand to the Court of Military review, Petitioner contended all of the findings of guilty should have been dismissed inasmuch as the actions of her former defense counsel were so pervasive and carried on throughout all of the essential states of the proceedings as to render it impossible to limit the taint to any specific charges. As a consequence, the "spillover" from her military counsel's ineffective representation could not be divided by charges and should have been found by the court to taint the entire proceedings.

On remand, the Court of Military Review reviewed the record without conducting an evidentiary hearing. On 16 October, 1987, the Court issued its decision.
It concluded with respect to alternative untainted evidence concerning the charges on which Peelman has testified, "Our review of the record and the pretrial investigation convinces us that no such evidence exists." (Opinion of the Court of Military Review, 16 October 1987, set forth in the Appendix at pages 135 to 141. In addressing the "spillover" issue, the Court determined that the issue was one of first impression, and decided the issue based upon its analogy to cases involving improper use of an accused's immunized testimony. Based upon this review it concluded that there was an "independent" basis for the remaining charges. The Court dismissed the charges which were based upon Peelman's testimony, affirmed the finding of guilty on the remaining offenses charged, and ordered a rehearing on the sentence.

The sentence was affirmed upon resentencing on 3 May 1988, except for reduction of the confinement to 14 months (the time served). Newak appealed the October 16, 1987 decision of the Court of Military Review and her resentencing to the Court of Military Review. In its decision

of 6 January 1989, that Court again upheld the remaining offenses and the sentence.

On review the Court of Military Appeals affirmed the decision of the Court of Military Review. Lt. Newak now seeks a Writ of Certiorari to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

I

WHERE A CRIMINAL DEFENSE COUNSELS' DUAL REPRESENTATION WAS HELD TO BE PREJUDICIAL TO DEFENDANT, A FINDING OF HARMLESS ERROR AS TO PART OF THE CHARGES BROUGHT IN A SINGLE PROCEEDING IS A DIRECT CONTRADICTION TO SUPREME COURT'S RULINGS.

The decision of the Court of Military Appeals in this case is in direct contradiction to this Court's holding that joint representation of conflicting interests by a defense attorney can never be harmless error. Holloway v. Arkansas, 435 U.S. 475 (1977); Cuyler v. Sullivan, 446 U.S. 335 (1979). After a trial by court-martial, Petitioner was convicted of all charges. Upon appeal, the Military Court of Appeals held the dual representation of the defendant and a chief prosecution witness constituted a conflict of interest and was reversible error as to some of the convictions but harmless as to others. United States v. Newak, 24 M.J. 238 (1987) The court also ruled that the lower military court could decide whether the convictions which it set aside could be reheard with evidence which might be "untainted" by the conflict. Id. at 244.

This Court's previous cases have established that where an actual conflict of interest prejudices a criminal defendant, there is a breach of the defendant's right to effective assistance of counsel. Such breach is a violation of the Fifth Amendment guarantee of due process which assures there shall be no governmental deprivation of life, liberty or property without due process and the Sixth Amendment guarantee of counsel for criminal defendants.

In Chapman v. California, 386 U.S. 18 (1967) the guarantee of counsel was held to be among those "constitutional rights so basic to a fair trial that their infraction

can never be treated as harmless error." Id. at 23.

When considering the issue of dual representation involving an actual conflict of interest in criminal cases where prejudice to the defendant occurred, this Court has required reversal. Holloway v. Arkansas, 435 U.S. 475 (1977). The Supreme Court ruled that where an error occurs at trial, the effect can be traced,

> [b]ut in a case of joint representation of conflicting interests the evil--it bears repeating--is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. . . . And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, [when the error occurs on the trial record] unguided speculation.

Id. at 490-491 (emphasis added.)

Holloway is an interpretation of the seminal dual representation case of Glasser v. United States, 315 U.S. 60 (1972), in which the Court stated, "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Id. at 76. Yet that is exactly what the military courts have done in the instant case, where certain convictions were set aside, while others were allowed to stand.

Even if this Court is convinced that in cases of multiple convictions at a single trial, prejudice from dual representation which involved actual prejudice could be harmless to some charges, such a rule should not be promulgated and applied in this case. Here, there was actual prejudicial conduct which affected the petitioner from the earliest stages of the proceedings. The Court

of Military Appeals discussed the improper actions of Petitioner's counsel in the pretrial stages of her case, particulary during negotiations with the prosecutor. The Court noted:

> The Government has sought to downplay these exchanges by characterizing the immunity not as a matter of negotiation but rather as a "fait accompli." This contention overlooks the realities of the criminal justice process. We are aware that often the best defense that can be provided for a person accused of a crime is to offer to assist investigators and prosecutors in return for leniency in some form such as dismissal of charges, and reduction or suspension of sentence. The extent of leniency that can be obtained often varies in proportion to the extent of information being provided and the prominence of the person who is the subject of that information.

United States v Newak, 24 M.J. at 242.

The court also made the following observations concerning Smith's conduct:

> In light of the important role of an attorney in advising his client as to cooperation with prosecutors and in negotiating for such benefits as transactional versus testimonial immunity, or a reduced sentence, we cannot gloss over Smith's role as Peelman's legal advisor. If he performed that role in a professional manner, his performance almost inevitably compromised his role as Newak's legal advisor. Conversely, if he acted effectively for Newak, he could not have performed suitably for Peelman.

United States v Newak, 24 M.J. at 242.

The court concluded:

> Unfortunately, Captain Smith's sacrifice of appellant's

> interests did not end with this sin of omission but extended, as well, to subsequent sins of commission. After he had severed his relationship with appellant, he continued to represent Peelman in this matter and actively to advise her and encourage her to act in her own self-interest. Sadly for Smith - and for appellant - it is clear that those interests were not parallel to appellant's; indeed, they ran to a point of inevitable confrontation. Under these circumstances, Captain Smith aided the successful prosecution of his former client just as surely as if he had sat at the trial counsel's table and just as surely, this was improper. See generally Art. 27(a), UCMJ, 10 U.S.C. § 827(a) ("nor may any person who has acted for the defense act later in the same case for the prosecution"); accord United States v. Stubbs, 23 M.J. 188 (C.M.A. 1987).

United States v Newak, 24 M.J. at 242.

In discussing Smith's impediment to pretrial negotiations and plea bargaining on Newak's behalf, the Court of Military Appeals stated, "In short, because Captain Smith was not free to argue against Peelman's interest, he was not free to represent Newak adequately ...." United States v Newak, 24 M.J. at 243.

Clearly, if defense counsel had acted in Newak's best interest during the pre-trial stages of the proceedings, there might not have been any trial. The Supreme Court's decisions since Glasser v. United States in 1942, have held that judgment must be reversed where a criminal defendant has been prejudiced by his counsel's conflict of interest. 315 U.S. 60 (1942). Where actual harm is done to the defendant during the investigation and the trial, the court thereafter should not permit inquiry to determine if

some part of the case was left unaffected. The decision of the Court of Military Appeals directly contradicts this precedent and a writ of certiorari should be granted.

II

WHEN THE COURT OF MILITARY APPEALS CONCLUDED THAT DEFENSE COUNSEL'S CONFLICT OF INTEREST RESULTED IN "TAINTED EVIDENCE" IT REDUCED A QUESTION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS TO ONE OF MERE EVIDENTIARY STANDARDS.

The action of the Court of Military Appeals in considering the constitutional violations described in the argument above as merely an evidentiary issue is a grievous offense against an individual's constitutional rights. To permit courts to treat a violation of such a fundamental constitutional right as the Sixth Amendment guarantee of effective assistance of counsel in such a casual manner, denigrates the importance of this right in our system of justice.

In Kastigar v United States, 406 U.S. 441 (1972), this Court established a standard to assure that the prosecution did not use any evidence acquired from immunized testimony. However, when the constitutional violation results from dual representation involving an actual prejudice from counsels representation of a defendant and a prosecution witness, it is inappropriate to apply Kastigar standards. In Kastigar, this Court was concerned with upholding the Fifth Amendment prohibition of compelled self-incriminatory testimony while still giving reasonable rein to law enforcement personnel. Kastigar requires that one need merely show that he testified under a grant of immunity to shift to the government the heavy burden of proving an independent source for all evidence. 461 U.S. at 461. But in a case where confidential information, gleaned through a former defense counsel's advice to a government witness testifying with immunity is used against the defendant, the resulting prejudice to the

defendant is too pervasive to permit such a cure.

Although Newak's case does involve the use of immunized testimony, the constitutional violation here is much more egregious. As the Court of Military Appeals stated, Newak's former attorney acted as a prosecutor in this case, "just as surely as if he had sat at trial counsel's table." United States v. Newak, 24 M.J. at 243. The prosecution was able to take advantage of confidential information known to Smith through his prior representation of Newak. This constitutional violation goes to the very core of a defendant's right to effective assistance of counsel and due process, and no semblance of due process remains in a proceeding in which the use of such testimony is permitted.

If the Court of Military Appeals' ruling is permitted to stand, the significance of this grave constitutional violation will be reduced to an evidentiary error.

Where the basic constitutional rights to due process and effective assistance of counsel are violated in a criminal prosecution, the remedy must be commensurate with the error. In this case the harm went beyond mere evidentiary taint. In allowing an evidentiary remedy, the Court of Military Appeals has undermined the constitutional protection afforded to all citizens under the Sixth Amendment guarantee of the right to effective assistance of counsel. The Court should grant this petition to assure such a wrong is not perpetuated.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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November 7, 1989

(Appendix UNDER SEPARATE COVER)

FOOTNOTES:

[1] The remaining charges which were heard at the court-martial are set forth in the Staff Judge Advocate Review of court-martial, dated 06 May 1982, set forth in the Appendix at pages 75 to 103.

2 The Advice of the Staff Judge Advocate, dated 04 February 1982, recommended that specifications 2, 3 and 4 of Charge IV be dismissed.

Pursuant to this recommendation, these charges were dismissed prior to the trial by court-martial.

The Staff Judge Advoate Review of 06 May 1982, set forth in the Appendix at pages 75 to 103, recommended that the findings of guilty of Specifications 1 and 2 of Charge I not be approved, and that the findings of guilty on Charge II and its specification be reduced to finding of guilty of the lesser included offense of attempted possession of amphetamines.

On 10 June 1982 the Convening Authority issued General Court-Martial Order No. 9, set forth in the Appendix at pages 104 to 108, in which it disapproved the Findings of Guilty of Specifications 1 and 2 of Charge I and, with respect to Charge II, approved guilty findings only of an attempted violation. Except for a reduction in the period of confinement to six years, the remaining findings and sentence were approved.

On 23 March 1983, by Action of the Judge Advocate General, set forth in the Appendix at page 116, all confinement in excess of three years was remitted. Lt. Newak served fourteen months at Leavenworth Prison and was then paroled.